

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PETITIONER

v.

ONE FORD COUPE AUTOMOBILE, No. 4776501,
Alabama license No. 10978, Garth Motor
Company, claimant

No. —

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered on February 27, 1925, affirming an order of the District Court sustaining a motion to quash the libel filed in the above-entitled cause.

STATEMENT

The libel was filed by the Government in the United States District Court for the Northern

District of Alabama against the above-described automobile for the forfeiture thereof under the provisions of Section 3450 of the Revised Statutes of the United States.

The libel alleged that the automobile was in the possession of and under the control and custody of one Killian, and was "then and there being used by the said Ed L. Killian for the purpose of depositing, and concealing therein and therewith certain goods and commodities for or in respect whereof the taxes imposed by law had not been paid, to wit, twenty-seven quarts of illicit distilled spirit, to wit, whisky, with intent then and there to defraud the United States of such taxes aforesaid or some part thereof." (R. 2.)

Respondent Garth Motor Company intervened in the case, claiming ownership of the car in question under a "certain title-retaining instrument" executed to said Garth Motor Company by one Urton Munn and duly recorded. (R. 12.) The Government did not challenge respondent's statement that the automobile had been sold to Munn under contract for deferred purchase price payments upon the condition that the title remain in the seller until the full purchase price was paid, and that the whole of the purchase price had in fact not been paid.

A motion to quash the libel was filed by the respondent Motor Company, which motion was sustained by the District Court. (R. 21.) The

order of the District Court was affirmed by the Circuit Court of Appeals.

QUESTION PRESENTED

The question presented is whether Section 3450, Revised Statutes, is available to the Government for the forfeiture of a vehicle used in the removal or concealment of a taxable commodity—whisky—since the enactment of the National Prohibition Act (Chap. 85, 41 Stat. 305) and the Act Supplemental thereto (Chap. 134, 42 Stat. 222).

STATUTES INVOLVED

Section 3450, Revised Statutes, provides, in part, as follows:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, * * * shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.

Section 26, Title II, of the National Prohibition Act, reads, in part (41 Stat. 315):

Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the

proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals erred in holding that Section 3450, Revised Statutes, is no longer in force and effect and that it has been superseded by the National Prohibition Act.

2. The decision is detrimental to the interests of the Government in the enforcement of the National Prohibition Act, for the reason that Section 3450, Revised Statutes, has been generally and effectively employed in preventing the unlawful traffic in intoxicating liquors by forfeiting the vehicle or other means of transportation.

3. It is important that this Court pass upon the question whether Section 3450, Revised Statutes, is still available to the Government for the forfeiture of a vehicle used in the removal or concealment of a taxable commodity.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF THE PETITION

The enforcement of the National Prohibition Act had not been long in progress until it was discovered that Section 26 of Title II thereof, providing for the seizure and forfeiture of vehicles used in the illicit transportation of intoxicating liquor was in its operation impracticable in many respects, because of its provisions authorizing the delivery of seized vehicles to claimants thereof upon execution by them of bonds for the return of the vehicles at the time of trial to abide the judgment of the court; because of the forfeiture being made dependent upon the conviction of the defendants in criminal prosecutions against them; and because of the opportunity afforded third-party claimants to come in and establish ownership in the vehicles or to assert bona fide liens against the proceeds from the sales thereof. These equitable provisions of the statute defeated its very purpose. Persons engaging in illicit traffic in intoxicating liquors were able to cover up their ownership or interest in the vehicle and save it from forfeiture by mortgaging the same, or, in some instances, by arranging with confederates, against whom no wrongdoing could be proved, to come in as claimants and rescue the seized property. The instant case affords an example of the

arrangement usually entered into for the purpose of defeating the statute. The bootlegger, as a rule, when purchasing an automobile makes but a small initial payment and arranges for small monthly payments, so that if his interest in the car is forfeited his loss will be kept at a minimum. Moreover, the requirement that the defendant must first be convicted on a criminal charge before the vehicle can be forfeited has resulted in great delays, the accumulation of expensive storage charges, and the congestion of court dockets.

For these reasons the Government adopted the policy of forfeiting vehicles under Section 3450, Revised Statutes, whenever it was practicable and possible to do so. It was found that Section 3450, Revised Statutes, afforded a much more summary and effective procedure in that it did not give interveners an opportunity to come in and defeat the forfeiture and did not depend upon a criminal conviction, but effected prompt dispatch of cases brought thereunder and consequential relief of the dockets. Under this statute the *res* is considered the offender and third party claimants are not privileged to intervene.

This procedure on the part of the Government gave rise to a contrariety of opinions in the courts below, although the Circuit Courts of Appeals now generally hold that Section 3450, Revised Statutes, has been superseded by Section 26, Title II, of the National Prohibition Act. The contentions usually

advanced against the applicability of Section 3450, Revised Statutes, are as follows:

1. That Section 26, Title II, of the National Prohibition Act, providing a complete procedure and a less drastic method for dealing with vehicles used in transporting liquor, impliedly repeals and supersedes said Section 3450.

2. That Section 3450 no longer applies to the transportation of illicit spirits or intoxicating liquors because all prohibition and regulations relative to such liquors are comprehended in the National Prohibition Act.

3. That intoxicating liquors intended for beverage purposes are not subject to tax and therefore Section 3450 has no application.

In the instant case the court below concedes that intoxicating liquors are still taxable, although their manufacture is prohibited, citing *United States v. Yuginovich*, 256 U. S. 450, and *United States v. Stafoff*, 260 U. S. 477. But notwithstanding this, it held that an automobile used for the deposit and concealment of illicitly distilled liquor, with intent to defraud the United States of the tax thereon, could not be forfeited under the provisions of Section 3450, Revised Statutes, because, there being a conflict between the two statutes, Section 3450 was superseded by Section 26 of the National Prohibition Act, and the Government was restricted to the use of the

latter. In this, the Government submits, the court erred.

Section 3450, Revised Statutes, in so far as it relates to vehicles used to *deposit* or *conceal* distilled spirits, was not repealed by Section 26, Title II, National Prohibition Act, which appears to be limited in scope to vehicles in motion, and does not cover the whole subject matter of Section 3450. The objects of the two statutes are not the same, the former being a law in aid of the revenue, the latter being confined to suppressing the transportation of intoxicating liquor for beverage purposes and contemplating situations only in which the driver is apprehended, which driver must be convicted before the court is authorized to render judgment condemning the car. See *United States v. Claflin*, 97 U. S. 546; *United States v. Tynen*, 11 Wall. 88; *United States v. Stowell*, 133 U. S. 1.

General laws relating to internal revenue are not affected or superseded by subsequent laws unless the contrary clearly appears. *United States v. Barnes*, 222 U. S. 513. The National Prohibition Act levies no taxes: therefore it can not as a taxing statute supersede any of the revenue statutes. Section 35, Title II, imposes *penalties* but not taxes. It provides punishment for unlawful conduct rather than a means for obtaining revenue. *Lipke v. Lederer*, 259 U. S. 557; *Regal Drug Corporation v. United States*, 260 U. S. 386; *Fontenot v. Accardo*, 278 Fed. 871; *United States v. One Essex Coupe*, 291 Fed. 479.

Section 3450 is a law passed in the interest of the revenue to punish tax evaders; Section 26 was enacted in the interest of prohibition to punish evaders of the National Prohibition Act. The objects of the two statutes are different, the subject matter thereof largely different and the *modus operandi* very different. Section 3450 affects only untaxed liquors. Section 26 is not at all concerned about the payment of taxes on liquor. Section 3450 operates on a vehicle not in motion. Section 26 operates principally on vehicles while in motion and the forfeiture can not be completed until the driver has been convicted. Section 3450 provides no redress for innocent third parties having an interest in the seized property, whereas Section 26 provides equitable means for third-party claimants to come in and establish their claims to the property or their liens against the proceeds from the sale thereof.

Many of the courts holding against Section 3450 seem to be influenced, as apparently was the court below, by a consideration that the provisions of Section 3450 are too severe and that therefore the less drastic penalties of Section 26, which protect an innocent interest, should be applied. But this is no criterion on which to hold Section 3450 inapplicable if the case otherwise comes within the statute, especially when, as above pointed out, procedure under Section 26 is ineffectual. The Government had a right to elect to rely on Section

3450, instead of Section 26, for the forfeiture of the vehicle here involved.

It is also argued that the removal, deposit, and concealment referred to in Section 3450 have reference to a fixed place of manufacture, storage, and assessment of the tax, and can not be distorted to apply to such transportation as is met in prohibition enforcement, where the operator of the vehicle does not have in mind the avoidance of a tax, but is endeavoring to avoid the prohibitions of the National Prohibition Act. For this reason, it is said, Section 3450 is inapplicable. The Government submits, however, that the considerations above set forth refute such a construction of the statute. Intoxicating liquors have always been subject to tax and Section 3450 has always been an effective weapon in enforcing taxing statutes, and is still available as such. In the instant case the charge is not that the car was being used to remove, but was being used to deposit and conceal distilled spirits with intent to evade taxes.

If there is a tax on illicitly distilled spirits, which has been conceded by the court below, and Section 3450 has not been repealed or superseded by the National Prohibition Act and the Act Supplemental thereto, there is no question that the Government was entitled to a forfeiture of the automobile involved in this case, irrespective of whether or not the claimant who sold it and retained title thereto had knowledge of its unlawful

use. *Goldsmith-Grant Co. v. United States*, 254 U. S. 505; *United States v. Mincey*, 254 Fed. 287; *United States v. One Saxon Automobile*, 257 Fed. 251; *United States v. One W. W. Shaw Automobile Taxi, etc.*, 272 Fed. 491, *affd.* 281 Fed. 669.

In the *Goldsmith-Grant case*, decided by this Court, the facts were similar to those in the present case. It involved a libel proceeding brought under Section 3450 for the forfeiture of an automobile used prior to the adoption of the National Prohibition Act in the removal, deposit, and concealment of nontax-paid spirits. The vehicle was being operated by the purchaser. The Goldsmith Company intervened as owners under the terms of a conditional sale contract by which they had reserved title until completion of payment of the purchase price. They were in fact innocent of the unlawful use of the car and alleged that the taking of their property would be a violation of the Fifth Amendment. But this Court held that Congress in enacting this statute treated the *res* as the offender and in providing so arbitrary a rule took into account the interests of the Government, its revenues and policies. This case was decisive as to the force and effect of Section 3450 in cases of removal and deposit and concealment of nontax-paid intoxicating liquors. Whether the same rule would be applied to cases where the vehicle was operated by one who had stolen it, or was in possession of it without the express or implied consent of the owner, was not determined.

While the case just cited was decided after the adoption of the National Prohibition Act, it arose before national prohibition became effective. It is important to the proper enforcement of the revenue laws and the National Prohibition Act that the Government know whether the above decision with respect to Section 3450 is applicable to a case which, like the present, arose after the enactment of the National Prohibition Act and Act Supplemental thereto, or whether, as held by the court below, said section has been superseded by Section 26, Title II, of the National Prohibition Act, and the Government is therefore compelled to proceed under the latter.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the writ herein applied for should be granted.

JAMES M. BECK,

Solicitor General.

MABEL WALKER WILLEBRANDT,

Assistant Attorney General.

BYRON M. COON,

Special Assistant to the Attorney General.

MAY, 1925.